APPELLANT PRO SE:

DENNIS RAY PETERSON
Pendleton, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DENNIS RAY PETERSON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 77A01-0607-CV-298
	)	
DENNIS MEYER, et al.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable Thomas E. Johnson, Judge
The Honorable Ann Smith Mischler, Magistrate
Cause No. 77D01-0601-CT-6

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Dennis Ray Peterson, *pro se*, appeals the dismissal of his complaint in which he alleged he was denied due process and subjected to cruel and unusual punishment. The defendants—Dennis Meyer, Correctional Officer Springer, Arthur Davis, one unidentified Captain and three unidentified Conduct Adjustment Board ("CAB") members—are all employed by or affiliated with the Wabash Valley Correctional Facility ("WVCF"), where Peterson was incarcerated. Because Peterson failed to exhaust the administrative remedies available through the prisoner grievance procedures, we affirm the dismissal of his complaint.[1]

FACTS AND PROCEDURAL HISTORY

On January 9, 2006, Peterson filed his complaint. We accept his well-pleaded facts as true. *Smith v. McKee*, 850 N.E.2d 471, 474 (Ind. Ct. App. 2006).

In January of 2004, Dennis Meyer was the dentist at WVCF. Correctional Officer Springer was a "Screening Officer." (App. at 12.) The Conduct Adjustment Board ("CAB") was made up of three individuals whose identities are unknown. Arthur Davis was employed as a "counselor" at WVCF. (*Id.* at 16.)

From January 5th to 7th, Peterson had a "serious painful condition."[2] (*Id.* at 14.) Meyer committed "unlawful negligence in failing to provide [Peterson] any treatment of a serious painful condition within a reasonable time of notification, to which resulted in

[1] The trial court dismissed Peterson's complaint before it was served on the defendants. Therefore, there is no appellee. The Indiana Attorney General filed a notice of noninvolvement in this matter and a motion asking us to correct our docket by removing any reference to it as a party to this appeal. On April 20, 2007, we granted the State's motion and ordered the docket corrected.

[2] Peterson's complaint does not further explain his serious painful condition, but because he sought treatment from a dentist, we presume Peterson had a toothache.

Plaintiff suffering unnecessary prolonged physical pain, mental and emotional anguish, and hunger." (*Id.*) Peterson filed a disciplinary "grievance/complaint" against Meyer. (*Id.*) On January 14, 2004, in response to the Peterson's complaint, Meyer filed a false disciplinary charge against Peterson.

Peterson asserts those facts support a claim of cruel and unusual punishment, because the failure to treat his condition "resulted in plaintiff suffering unnecessary prolonged physical pain, mental and emotional anguish, and hunger," (*id.*), and the filing of the false disciplinary charge "caused plaintiff to be fearful of a guilty finding, sanctions and placement on segregation, and mental and emotional anguish." (*Id.*)

Then, on or about January 20, 2004, in violation of Policy 02-04-101 of the Disciplinary Code for Adult Offenders, Peterson was denied a disciplinary hearing on Case Number WVD 04-01-0106, the false conduct charge Meyer filed. Although the exact nature of each person's involvement is not described, Peterson alleges Meyer, Officer Springer, an unidentified Captain, and the three unidentified members of the CAB failed to provide him a disciplinary hearing. Because the failure to provide a hearing denied Peterson the ability to be present at the disciplinary hearing, to speak, and to present evidence in his defense, he claims all those defendants denied him due process.

Peterson also alleges Officer Springer and the three members of the CAB did not provide him a copy of the findings of fact. This, he claims, violated his right to due process in a second fashion.

Finally, Peterson's complaint alleges that Counselor Davis, in his official and individual capacities, while acting under color of state law, denied Peterson "a hearing

under Indiana Department of Correction Policy 00-02-301 'the Offender Grievance Process.'" (*Id.* at 16.) Peterson asserts this denial was a violation of his right to due process under the Fourteenth Amendment.

The day after Peterson filed his complaint in the Sullivan Superior Court, the court dismissed it in an order that provided:

> The Court has examined Plaintiff's Complaint in accordance with I.C. 34-58-1-1 and has determined that the claim is frivolous in that it does not have an arguable basis in the law and does not state a claim upon which relief may be granted. Specifically, the Plaintiff has failed to provide any proof to the Court that he exhausted his administrative remedies before filing this cause of action; further pursuant to *Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988), the Court has no jurisdiction to review Conduct Adjustment Board hearings nor can the Court overrule the findings of the Conduct Adjustment Board. From a review of the Plaintiff's Complaint it appears the Plaintiff is requesting the Court to review his prison disciplinary hearing and determine whether any constitutional rights violations occurred and award damages accordingly. The Court does not have jurisdiction over these matters.
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> Based on the foregoing, Plaintiff's Complaint cannot proceed and this matter is removed from the Court's active docket.

(*Id*. at 8.) Peterson appeals.

DISCUSSION AND DECISION

The trial court reviewed Peterson's complaint and dismissed it pursuant to Ind. Code ch. 34-58-1, which provides a screening procedure for inmate litigation. Section One of that chapter provides: "Upon receipt of a complaint or petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter." Section Two provides in pertinent part:

> (a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:
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> (1) is frivolous;
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> (2) is not a claim upon which relief may be granted; or
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> (3) seeks monetary relief from a defendant who is immune from liability for such relief.

Ind. Code § 34-58-1-2.

We review *de novo* a trial court's grant of a motion to dismiss pursuant to that statute. *Smith*, 850 N.E.2d at 474. When conducting our review, we accept as true the well-pleaded facts in the complaint and determine "whether the complaint . . . contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory." *Id.*

In part, the trial court dismissed Peterson's complaint because Peterson failed to exhaust his administrative remedies. (App. at 8.) Peterson asserts he was not required to exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 claim in a state court. He is incorrect. *See Higgason v. Stogsdill*, 818 N.E.2d 486, 490 (Ind. Ct. App. 2004) ("the applicable provisions of the [Prisoner Litigation Reform Act], together with the cases construing those provisions, mean that before he or she may bring a § 1983 action in an Indiana state court, a prisoner must exhaust all administrative remedies"), *trans. denied* 831 N.E.2d 740 (Ind. 2005).

We know the WVCF has a five-step grievance procedure to resolve prisoner complaints. *See id.* ("In the instant case, the WVCF had a grievance procedure in place to resolve [the plaintiff's] complaints. That procedure, as reflected in an exhibit filed by the appellees, was and continues to be a five-step process."). Peterson's explanation of

the facts in his complaint suggests a hearing before Counselor Davis around January 20, 2004 was the first step of the process. If Peterson believes Counselor Davis violated the grievance process by failing to provide Peterson a hearing, then Peterson should have appealed to the next level of the grievance procedure.

Peterson also claimed he was denied due process when the defendants failed, under Case Number WVD 04-01-0106, to provide him a disciplinary hearing before the CAB or to provide him a copy of the CAB's findings.[3] However, trial courts do not review prison disciplinary actions:

> In *Hasty* [*v. Broglin*, 531 N.E.2d 200 (Ind. 1988)], this Court declared:
>
> > Neither Indiana statutes nor common law rules establish Hasty's right to judicial review of prison disciplinary action. Absent statutory authorization, Indiana courts have declined to review a decision of a penal institution to take away an inmate's good-time credit for a prison infraction. *Riner v. Raines*, 274 Ind. 113, 115, 409 N.E.2d 575, 577 (1980). The current system of administrative review by policy makers and executive officers within the correction department establishes a fair procedure to resolve disputes, one adequate under due process.
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> *Hasty*, 531 N.E.2d at 201. In *Riner*, we expressly held that there is "no constitutionally protected right to judicial review of the decisions of fact-finding and appellate tribunals presently conducting disciplinary proceedings within the prison system." 274 Ind. at 118-19, 409 N.E.2d at 579.
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> In the eleven years since *Hasty*, the Indiana General Assembly has not enacted any statutory authorization providing for the judicial review of a disciplinary decision of a penal institution. Regardless of the procedural vehicle employed -- whether mandate to compel compliance with statute or direct judicial review of a prison disciplinary decision -- [appellant] is seeking judicial intervention in the disciplinary actions of the Department

[3] We note Peterson's complaint does not allege the CAB found he violated a rule. Nor is it clear it imposed any discipline on him based on Meyer's false disciplinary charge. Therefore, even if a court could review his claim, it does not state facts suggesting a violation of his right to due process.

> of Correction. We decline to retreat from the principles and policies reflected in *Hasty* and *Riner*. The relief sought is not available in Indiana courts.

Zimmerman v. State, 750 N.E.2d 337, 338 (Ind. 2001).

Nevertheless, Peterson asserts, he was not asking the trial court to review the outcome of his disciplinary proceeding, but rather he asked the court to review the *process* by which it occurred. He claims the denial of a hearing denied him due process and therefore should be actionable under § 1983.

In this regard, we find instructive the explanation of the Department of Correction appeals process contained in the Court of Appeals opinion in *Zimmerman*:

> On June 14, 1999, the Wabash Valley Correctional Facility Conduct Adjustment Board ("CAB") found by a preponderance of the evidence that inmate Zimmerman had tested positively for "Cannabinoids (THC)." Unpersuaded by Zimmerman's defense that the "test is not right" because he was on medication, the CAB found him "Guilty of Class A Conduct Report (A112) Possession, introduction or use of any unauthorized substance controlled pursuant to the laws of the State of Indiana." Consequently, Zimmerman's visitation privileges were restricted for six months to begin on June 28, 1999. On July 8, 1999, Zimmerman challenged his visitation restriction by filing a "complaint step 1" with the Department of Correction.
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> * * * * *
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> On July 22, 1999, the DOC responded to Zimmerman's administrative complaint step 1 as follows: "Your contact visits were suspended due to your conduct violations (Class A112). Legal language and references are not acceptable to use in the grievance process. Recommend you appeal to next level."
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> * * * * *
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> Zimmerman filed an "initial grievance" with the DOC on August 24, 1999. The DOC's September 13, 1999 response to his initial grievance reiterated, "tests deemed that Zimmerman had cannabinoids (THC) in his system at the time of urinalysis." The September response further stated that Zimmerman had "not appealed successfully through the CAB appeals process therefore, non-contact visits are appropriate at this time." Zimmerman appealed to the next level of the DOC. An October 8, 1999

> denial of appeal letter written by a DOC administrative assistant stated: "You tested positive for marijuana, not barbiturates or benzodiazepines. Nobody I talked to indicated you being on Elavil would cause false/positive. Depending on the amount, usage and the last time you took it, all could effect why it didn't show on the lab report."

727 N.E.2d 714, 715-16 (Ind. Ct. App. 2000), *vacated* 741 N.E.2d 1249 (Ind. 2000), *opinion issued* 750 N.E.2d 337 (Ind. 2001).

That language leads us to conclude: 1) there exists both a "CAB appeals process" and a separate DOC complaint process; 2) each of those processes appears to have more than one step; and 3) prisoners should appeal "successfully through the CAB appeals process" prior to filing a complaint with the DOC. Peterson's complaint does not suggest he exhausted those administrative remedies. Accordingly, the trial court did not have jurisdiction over this portion of his complaint.

Because Peterson failed to exhaust his administrative remedies, the trial court did not have jurisdiction over his § 1983 claims, and we affirm the dismissal of his complaint.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.